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IN THE

Supreme Court of the United States

OCTOBER TERM—1943.

No. 570.

BLACK DIAMOND LINES, INC.,
Petitioner,
(Respondent-Appellant below),

against

PIONEER IMPORT CORPORATION,
Respondent,
(Libellant-Appellee below),

and

TAMPA INTER-OCEAN STEAMSHIP COMPANY,
Respondent,
(Claimant-Appellant-Appellee below).

BRIEF OF RESPONDENT TAMPA INTER-OCEAN STEAMSHIP COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In opposition to the petition for a writ of certiorari, and in reply thereto, respondent, Tampa Inter-Ocean Steamship Company, respectfully shows:

Statement of Facts.

The District Court and the Circuit Court of Appeals both held the petitioner liable *in personam* and the S. S. *Lafcomo in rem* for damage to a cargo of lily of the valley pips carried on deck under on-deck bill of lading. The

basis of liability was improper stowage. Ultimate liability was placed upon the petitioner as charterer of the *Lafcomo.*

The petitioner selected and paid the stevedores who stowed the cargo. The petitioner's European port captain gave all the orders which were given to the stevedores as to the place and manner of stowage.

The respondent, Tampa Inter-Ocean Steamship Company was the owner of the S. S. *Lafcomo.* It chartered her on Government time form under date of October 19, 1939 to the Petitioner Black Diamond Lines, Inc., for one voyage from New York to Rotterdam and Antwerp and return. This charter party provided:

CLAUSE 2:

> "* * * Charterers are to provide necessary dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo * * *".

CLAUSE 7:

> "That the whole reach of the Vessel's hold, Decks and usual places of loading (not more than she can reasonably stow and carry), also accommodations for Supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel."

CLAUSE 8:

> "That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense

> under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts."

This is not the usual case of a ship being chartered by the owner to a shipper, but one chartered by an owner to a carrier. The Petitioner had a regular service between New York and Rotterdam and Antwerp with shore organizations in all three ports. Neither the *Lafcomo* nor her officers had any experience in that trade or with the particular kind of cargo carried.

The Petitioner booked 1847 cases and 20 bundles of 4 cases each of lily of the valley pips for transportation from Rotterdam to New York on deck. The bill of lading was signed by the Petitioner's agent and provided for stowage on deck at the shipper's risk.

The most bitterly disputed issue in the District Court was whether an agreement had been made between the Petitioner and the shipper for covering the cargo with tarpaulins. The District Court found that such an agreement had been made, although it was not incorporated in the bill of lading.

The District Court also found that Petitioner's agents and its European port captain instructed the stevedores, the master and officers of the *Lafcomo* that the cargo was not to be covered.

The District Court also found that the shipper requested stowage on the foredeck.

There was no way in which these pips could be carried on the foredeck as directed by the shippers, uncovered, and be protected from damage by salt water. The minute they were stowed uncovered they were doomed to destruction.

Stowage of the cargo was under the direction of Captain Hollaar, the European port captain of the charterer. Cap-

tain Hollaar testified as to his duties in connection with the stowage of this cargo, as follows:

Rec. 654:

> "The indication of the location where the parcel should be loaded on board the S.S. *Lafcomo,* the manner in which this should be done. The supervision in general of the loading operations and also in general the checking up of the outward condition of this shipment at the time of delivery alongside. The agreeing with the ship's staff as the way of securing the shipment on deck."

* * * * * * *

Rec. 666:

> "Seeing that the parcel was stowed in a seaman-like manner, where and as required by the shipper. Establishing the time at which the loading had to be undertaken."

* * * * * * *

Rec. 682:

> "I did instruct the stevedores to use dunnage on the deck and place fence boards along the railing as a result of my conversation with the Master and his staff about the stowage. As to the covering of the parcel, both Van Nievelt, Goudriaan & Co. and myself informed the stevedores that the shippers' representatives had revoked his orders for covering the parcel. Revoking the order for covering was the result of a discussion between Messrs. Van Nievelt, Goudriaan & Co. and the shippers' representative."

* * * * * * *

Rec. 684:

> "With regard to the actual loading and stowing I kept a GENERAL supervision. With regard to the

protecting there were no activities needed since the shipper had abandoned his wish for covering the parcel. With regard to the securing of the cargo I was satisfied to the notice that the ship's crew under the direction of their officers made a good job of this."

* * * * * * *

Rec. 685:

"I informed both the officers and the stevedores that the shippers' representative had revoked his demand for covering the parcel, with the tarpaulins."

The Court found that the pips could have been protected from salt water damage by stowage on top of the hatches and covering with tarpaulins:

Rec. 938:

Finding 35: The 1847 cases and 20 bundles of 4 cases each of lily of the valley pips comprised a total of 9309 cubic feet (118 short tons) which could all have been stowed safely on top of Nos. 1 and 2 hatches (themselves three feet above the deck) in piles of 6½ to 6¾ feet high without danger to the vessel's stability; thus stowed on top of dunnage on such hatches and covered with three tarpaulins, one underneath and two on top, the top tarpaulin overlapping the bottom tarpaulin and the forward top tarpaulin overlapping the after top tarpaulin, and all lashed and secured to the hatch coamings and ring bolts on the deck, the cases would have been free from the danger of submersion in the water flooding the foredeck plating, and the contents of the cases would have been protected from damage by sea water in the weather experienced on the voyage.

No one claimed that it was possible to protect this cargo from salt water damage without covering it with tapaulins. The only finding the District Court made was that it could have been protected by such coverage and stowage on top of the hatches. In fact, Captain Hollaar testified that when the shipper agreed that it should not be covered with tarpaulins nothing was done about protecting the cargo from water damage because such protection was not possible.

In placing ultimate liability on the Petitioner the Court said:

District Court (Rec. 927):

> "Respondent's witnesses stated that the ship's chief officer and the stevedores were told by respondent's port captain that the shipper's representative had revoked his demand that the cases be covered with tarpaulins. As hereinabove stated, I have concluded that the shipper's representative did not revoke the demand that the shipment be covered. In view of this unfounded representation by respondent's agents to the ship's officers as to the alleged withdrawal of the shipper's demand, I am of the opinion that as between the respondent and the claimant, the respondent should bear the entire loss and that the respondent should be required to reimburse the claimant for any sum which the claimant may be required to pay in satisfaction of libellant's claim for damages."

The Circuit Court of Appeals (Rec. 978):

> "And since as the Court found Libellant's demand for tarpaulin coverage was never withdrawn, the statement of respondent's agents to the *Lafcomo's* captain to the effect that tarpaulins were not needed was a gross misrepresentation of fact and Respondent should therefore be held for the entire damage as against the claimant. *Canadian Transport Co. Ltd.* v. *Court Line, Ltd.* (1940) A. C. 934."

SUMMARY OF ARGUMENT.

The question of responsibility as between the Petitioner and the "LAFCOMO" was correctly decided by the District Court and the Circuit Court of Appeals and their decisions are not in conflict with those of this Court or any other Circuit.

POINT I.

There is no conflict between the opinion of the Circuit Court of Appeals and that of the Circuit Court of Appeals for the First Circuit, in *The Nidarholm*, 34 Fed. (2d) 442.

In the *Nidarholm* case the vessel was held to be unseaworthy because it was top heavy. The Court said:

> "The facts are stated in the opinion of the District Judge and need not be repeated 26 F. (2d) 92. His conclusions that the steamer, because of excessive loading and too much deck cargo was top heavy and unseaworthy when she began the voyage—faults for which her master was responsible, were clearly correct."

The *Lafcomo* was in proper trim. She was not unseaworthy in respect to her ability to navigate properly. In the *Nidarholm* case the Court said:

> "As to the dangers of a distinctly maritime character and unusual stresses set up by the movement of a vessel at sea which lie peculiarly within the knowledge and experience of mariners, the charterers were entitled to rely on the master's judgment."

But here we have a case where the petitioners as charterers were more experienced than the master. It was their trade.

While they had not handled this particular kind of plant before that, they had handled other live plants. The officers of the "LAFCOMO" had never carried live plants either as deck or underdeck cargo. Special knowledge and experience was with the charterers and not with the owners.

The Circuit Court of Appeals in *The Nidarholm* cited with approval *The Thomas P. Beal,* 11 Fed. (2d) 49 (3 C. C. A.). That was a case where the charterer was also a carrier and as between the charterer and the owner, the charterer was held liable for damage to cargo due to stowage which did not affect the seaworthiness of the ship as a ship, but was improper stowage so far as danger of damage to the cargo was concerned.

POINT II.

There is no conflict between the decision of the Circuit Court of Appeals and that of this Court in *The Nidarholm* case.

The charterers in *The Nidarholm* case, 282 U. S. 681, petitioned for and obtained a writ of certiorari. Mr. Justice Stone said:

> "This court granted certiorari (281 U. S. 712) on a petition which relied in part on an alleged conflict of the decision below with that of the Court of Appeals for the Second Circuit, in *Olsen* v. *U. S. Shipping Company,* 129, C. C. A. 607, 213, Fed. 18."

and in referring to the decision of the Lower Court, said (282 U. S. 680, 75 L. ed. 614) at 617:

> "Whether the court considered the topheaviness of the ship, caused by the faulty stowage, and the defective cribbing to be joint contributing causes of the loss, or thought the latter the proximate cause,

is not clear. But it reached the conclusion, without referring to any supporting facts, that the construction of the cribbing was a joint undertaking carried out by the charterer and the vessel, for the failure of which both were at fault, and decreed that the loss be divided.

"As respondent did not ask certiorari, the only question we shall consider is whether the court below was wrong in denying the asserted liability of the ship for the entire loss."

At 621:

"The owner's duty to provide a seaworthy and cargo-worthy ship at the beginning of the voyage did not extend to the defective cribbing. That warranty applies only to the ship and such equipment as is called for by the charter party". * * *

"Even though the master's duty of supervision of cargo stowage might, for some purposes and under other circumstances, be deemed to extend to the erection of this structure as a means of stowing the deck load, still we think there was no duty of ship or master to prevent the charterer from loading the pulpwood in such manner as to expose it to dangers ordinarily incident to the transportation of a cargo on deck, and not peculiarly within the prevision of the master. See *Lawrence* v. *Minturn*, 17 How. 100, 115, 15 L. ed. 58, 64. The charterer knew, as well as the master, that the ship would heel or roll at sea, and that the cribbing must be made sufficiently strong to hold the cargo on deck. We see no more reason for imposing responsibility on the ship for such an omission by the charterer than for the master's failure to prevent the charterer from stowing cargo in such manner that it is damaged by heat, The Thomas P. Beal (C. C. A. 3d) 11 F. (2d) 49; or in defective containers, The Oakley C. Curtis (C. C. A. 2d) 4 F. (2d) 982, *supra*, or in

such contact with other cargo that it suffers injury, cf. Elder & D. Co. *v.* Paterson, Z. & Co. (1924) A. C. 522, 560, 562, H. L., *supra.*"

There is no conflict on any point between the decision of this Court in *The Nidarholm* and that of the Circuit Court of Appeals in this case. In *The Nidarholm* case the charterer was a shipper. In this case the Petitioner as charterer was an experienced carrier. In addition the Petitioner told the master of the *Lafcomo* that this cargo was to be stowed on the foredeck and was not to be covered with tarpaulins. There is stronger reason for imposing ultimate liability on the charterer in this case than there was in *The Nidarholm.*

POINT III.

The decision of the Court below is not in conflict with that of the 5th Circuit Court of Appeals in *The Seguranca*, 250 Fed. 19.

The Seguranca was unseaworthy in that she was top heavy, just as *The Nidarholm* was. It is the duty of the master so to stow a ship that she is in proper trim and is able to navigate. In the case of the *Lafcomo* she was in proper trim. There was nothing in connection with the stowage of the cargo that in any way interfered with her seaworthiness as a ship. The same reasons set forth above for distinguishing *The Nidarholm* case apply equally to *The Seguranca.*

POINT IV.

The question of liability as between the owner and charterer was correctly decided.

The decision of the Circuit Court of Appeals is in accord with that of the Third Circuit in *The Thomas P. Beal*, 11 F. (2d) 49 and of the House of Lords in *Court Line Limited* v. *Canadian Transport Company Limited* (1940) A. C. 934.

In *The Thomas P. Beal*, the Court said:

> "(8, 9) The terms of the charter party make it certain there was a letting of the ship as distinguished from a contract for her services. In the former case, the relation between owner and charterer becomes that of bailor and bailee; whereas, in the latter, the relation is that of carrier and shippers. Carver (4th Ed.) §112; *The Barnstable*, 21 S. Ct. 684, 181 U. S. 469, 45, L. ed. 954. According as it is one or the other the question arises—whose agents wrought the injury, and there is suggested the inquiry put by Lord Esher in 1 Q. B. 258: 'When is a captain the owner's captain?' Transposing the question, we ask 'when is the captain the charterer's servant?' Directing these inquiries to the case in hand, it is clear that within the law of The Santona (C. C. 152 F. 516, 518), opinion by Judge Hough, while the owner did not surrender possession or control or command or navigation of the ship, 'he has surrendered control of her freight and passenger capacity and handed the same over to the charterers for all lawful purposes. The ship (was) the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master

> and crew (were) the servants of the charterers'. And so the parties in this case construed the charter party, for it is perfectly clear that the charterer, first at one port and then at another and finally at San Francisco, booked the freight, designated the places of stowage, did the stowing itself through its own stevedores, and assumed all responsibility therefor. On the issue between the charterer and the ship we find the charterer liable" (p. 53).

In the *Court Line* case Lord Porter said at 951-2:

> "In my opinion, by their contract the charterers have undertaken to load, stow, and trim the cargo, and that expression necessarily means that they will stow with due care. *Prima facie* such an obligation imposes upon them the liability for damage due to improper stowage. It is true that the stowage is contracted to be effected under the supervision of the captain, but this phrase does not, as I think, make the captain primarily liable for the work of the charterers' stevedores. It may indeed be that in certain cases, as e.g., where the stability of the ship is concerned, the master would be responsible for unseaworthiness of the ship and the stevedore would not. But in such cases I think that any liability which could be established would be due to the fact that the master would be expected to know what method of stowage would affect his ship's stability and what would not, whereas the stevedores would not possess any such knowledge."

It is clear from both the American and British cases that a charterer is responsible for any bad stowage done by stevedores employed by him. The only possible exception is a situation where the master has superior knowledge and experience. In this case the superior knowledge and experience rested with the charterers and not with the master.

We have in this case a factor which did not appear in either *The Thomas P. Beal* or in the *Court Line Limited* cases. The Petitioner's Rotterdam agents and European port captain told the master that the cargo was to be stowed on the foredeck and that it was not to be covered. The Petitioners were entitled to the use of the deck of the ship. The master of the *Lafcomo* had no option as to whether he would stow this cargo on deck or underdeck; he had no option as to whether it should be covered or not covered with tarpaulins. It was only by covering the cargo with tarpaulins that it could have been protected from salt water damage. The master carried out all the duties imposed upon him in seeing that this cargo was properly secured. The responsibility for whatever liability resulted from damage to the cargo by not covering it with tarpaulins was properly placed ultimately on the Petitioner.

POINT V.

If a petition should be granted in this case, the respondent, Tampa Inter-Ocean Steamship Company, requests that the entire case be reviewed.

This Respondent believes that the petition for a writ of certiorari should be denied. If, however, it is granted, it is respectfully requested that the entire case be reviewed, and not merely the question of liability as between the Petitioner and the Respondent Tampa Inter-Ocean Steamship Company. The *Lafcomo* was held liable for breach of an agreement made between the shippers of this cargo and the Petitioner, of which it had no knowledge and which was not incorporated in the bill of lading. This it is submitted is not a proper basis for a liability of the ship *in rem*. If any review is had of the case this question should also be considered.

CONCLUSION.

It is respectfully submitted that the petition should be denied.

Dated: January 19, 1944.

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Counsel for Respondent, Tampa Inter-Ocean Steamship Company.

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